Supreme Court, U.S.
FILED

No.: 06-620 NOV 02 2006

OFFICE OF THE CLERK

In the
Supreme Court of the United States

ANTHONY L. ARCINIAGA,

Petitioner,

-against-

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BELLAVIA GENTILE & ASSOCIATES, LLP
Attorneys for Petitioner
200 Old Country Road
Mineola, New York 11501
(516) 873-3000

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax (718) 522-4024
1-800-531-2028

QUESTIONS PRESENTED

1. Does the language of the Motor Vehicle Franchise Contract Arbitration Fairness Act, 12 U.S.C. 1226, (the "MVFCAFA") make it clear that the MVFCAFA applies only to controversies arising from the narrow mechanics of motor vehicles being bought and sold and serviced, or does its language indicate that it may also apply to controversies relating to manufacturers and dealers selling and buying motor vehicles in a broader sense, for example, the way General Motors markets its motor vehicles and establishes franchises and dealers to sell them?

2. Did Congress intend that the MVFCAFA should govern a narrower range of controversies between motor vehicle manufacturers and its dealers than the statute that it was intended to augment, the Automobile Dealer's Day in Court Act, 12 U.S.C. 1226 (the "ADDCA")?

3. Are the opinions of the Third, Fifth, Seventh and Eighth Circuit Courts of Appeals correct that, notwithstanding that an entity created by a manufacturer is a nominal party to a Dealer Sales and Service Agreement with the manufacturer, the dealer operator of such a motor vehicle dealership is the real beneficiary of the rights granted in such a contract, and that therefore the dealer operator has a cause of action under the ADDCA to enforce his rights?

4. Is the holding of the Second Circuit Court of Appeals that agreements between a manufacturer and a dealer operator - including a Dealer Sales and Service Agreement that is nominally an agreement between the manufacturer and a business entity created by the

manufacturer - cannot be read together as part of one integrated understanding correct, thereby placing into question the decisions of various Circuit Courts of Appeals and District Courts?

PARTIES TO THE PROCEEDING

The identities of all parties to the proceeding before the United States Court of Appeals for the Second Circuit are contained in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

APPENDICES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

1. Statement of Facts 2

2. Proceedings Below 6

REASONS FOR GRANTING THE WRIT 9

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL APPELLATE COURTS AND WITH FEDERAL DISTRICT COURTS IN OTHER CIRCUITS 9

II. THE DECISION BELOW MISCONSTRUES THE LANGUAGE OF THE MVFCAFA THEREBY UNDERMINING THE INTENT OF CONGRESS 15

CONCLUSION 22

TABLE OF AUTHORITIES

Pages

Cases:

Daimler Chrysler Vans, LLC v. Freightliner of New Hampshire, 2004 WL 51314(D.N.H.2004) 19

Equipoise PM, LLC v. International Truck and Engine Corp., 2006 WL 1594077 (N.D. Ill. 2006) 14

Kavanaugh v. Ford Motor Company, 353 F.2d 710 (7th Cir. 1965)..... 10

Lewis v. Chrysler Motors Corporation, 456 F.2d 605 (8th Cir. 1972)..... 14

Rea v. Ford Motor Company, 497 F.2d 577 (3rd Cir. 1974) 13

York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation, 447 F.2d 786 (5th Cir. 1971)..... 13

Other Authorities:

Motor Vehicle Franchise Contract Arbitration Fairness Act Report, S.REP.NO. 107-266(2002)..... 16

APPENDICES

Second Circuit Decision dated November 10, 2005 ..... 1a

Opinion and Order of the Southern District of New York 13a

12 U.S.C. 1222 ..... 24a

12 U.S.C. 1226 ..... 25a

Motor Vehicle Francise Contract Arbitration Fairness Act Report 27

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony L. Arciniaga respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 460 F.3d 231 and is reprinted in the Appendix at 1a. The opinion of the United States District Court for the Southern District of New York is reported at 418 F. Supp.2d 374 and is reprinted in the Appendix at 13a.

JURISDICTION

The decision of a panel of the Court of Appeals was rendered on August 8, 2006. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

12 U.S.C. 1226 and 12 U.S.C. 1222 are reproduced in the Appendix at 24a-26a.

STATEMENT OF THE CASE

1. Statement of Facts

In 1996 Petitioner Anthony L. Arciniaga became a dealer operator, investor and shareholder in a dealership franchise in Douglaston, New York that sold motor vehicles manufactured by Respondent General Motors Corporation ("General Motors"). The dealership, Douglaston Bay Chevrolet-Geo, Inc., was established by General Motors in accordance with a program developed through the Motors Holding division of General Motors in which an individual dealer operator invests in the dealership, along with General Motors, thereby becoming the holder of a percentage of non-voting non-dividend paying shares. The dealer operator then utilizes franchise profits, and later his own funds, to buy out the controlling interest of General Motors. The dealer operator, however, is actually solely responsible for the operation of the dealership from its inception. In addition, the agreements between the parties state that the dealership is established based upon the qualification of the individual dealer operator and that this individual is considered the "dealer operator."

Such a program is similar to programs that are common throughout the motor vehicle manufacturing industry.

These programs include a subcategory of such arrangements wherein the dealers are minorities. These arrangements with minorities are part of what is sometimes referred to in the industry as a minority dealer development program (an "MDDP"). Mr. Arciniaga became a dealer pursuant to the MDDP of General Motors. The apparent purpose of the MDDP is to

increase the number of minority owned General Motors dealerships throughout the country. Mr. Arciniaga was eligible to participate in the program because he is of Mexican descent and because of his previous experience in the industry.

Pursuant to the terms of the deal between General Motors and Mr. Arciniaga, Mr. Arciniaga was required to initially invest $210,000.00 in the corporate entity established by General Motors based upon Mr. Arciniaga's qualifications to be a dealer, Douglaston Bay Chevrolet-Geo, Inc. He was to utilize franchise profits, and later his own funds, to buy out the controlling interest General Motors had retained in the franchise from the inception of the deal. In addition, once Mr. Arciniaga succeeded, he would have been entitled to exercise the franchise's now extremely valuable option to purchase the real estate upon which it has sat since its inception for the fixed price of $2,700,000.00.

The parties executed various writings. This included a Dealer Sales and Service Agreement which provided, in part:

> This is a personal Services Agreement, entered into in reliance on the qualifications, integrity and reputation of the Dealer Operator identified in Paragraph Third [Anthony Arciniaga], and on the Dealer's assurance that Dealer Operator will provide personal services by exercising full managerial authority over Dealership Operations. Dealer Operator will have an unencumbered ownership interest in dealer of at least 15 percent at all times. Although this agreement is entered into in reliance on the personal services of the Dealer Operator, the dealer entity specified in this

> agreement is the only party to this Agreement with General Motors.
>
> * * * *
>
> General Motors enters into this agreement in reliance on the qualifications, integrity and reputation of the dealer owner identified in the Dealer Statement of Ownership [Anthony L. Arciniaga]. General Motors and dealer agree each dealer owner will continue to own, both of record and beneficially, the percentage stated in the Dealer Statement of Ownership, unless a change is made in accordance with Article 12.

The parties also executed a stockholders agreement and, subsequently, when the parties amended their deal in 1999, an Amended Stockholder's Agreement, and an Arbitration Agreement.

By 2004, after nine years of intense labor, Mr. Arciniaga had been able to purchase 38% of the shares of the dealership. Anxious to be able to buy out General Motors completely to become the sole owner of the franchise and reap its profits, Mr. Arciniaga offered to purchase General Motors' remaining shares in 2004. General Motors refused. Instead, in early 2005, Respondent, acting in bad faith and with only pretextual cause, unilaterally and summarily terminated Petitioner's position as a dealer. General Motors also attempted to coerce Mr. Arciniaga into accepting an inadequate payment for the shares of the franchise he had been able to purchase over the years - an offer Mr. Arciniaga refused.

General Motors referred to a provision contained in the writing labeled the Amended Stockholder's Agreement as its pretextual cause for Mr. Arciniaga's termination and not in the writing labeled the Dealer Sales and Service Agreement. It provided as follows:

> 3.1 Time and Manner of Exercise. The Operator [Anthony L. Arciniaga] hereby grants the investor [General Motors] the option (the "Investors Stock Option") to purchase the common stock from the operator at the price and on terms described below. The Investor may exercise (but is under no obligation to exercise) the Investors Stock Option at any of the following times: (e) at any time on or prior to the last day of the second month after the date of any balance sheet of the dealer company which the dealer company is required to deliver under Article 3 of its By-Laws if, it is determined from the balance sheet, the dealer company has a "unrecovered loss" (as that term is defined in the Dealer Company's Certificate of Incorporation) which exceeds $200,000.00.

Respondent also cited the Arbitration Agreement it entered into with Petitioner in 1999 for authority to demand that the instant controversy be submitted to binding arbitration instead of being litigated in court. The Arbitration Agreement provided as follows:

> GM, the dealer company, and Operator each respectively waive their respective rights to a jury trial and agree to submit to mandatory and binding arbitration, upon any parties written notice, any and all claims, demands, causes of action, disputes or controversies against any other

party including and parties employees, agents, officers and directors, which any party had prior to executing this Arbitration Agreement, now has or may ever have, *arising from or related to operator's investment or attempt to invest in the dealer company, the financial performance of the dealer company, the business operations of the dealer company, the business operations of the dealer company, the business decisions or practices of GM, operator, and/or dealer company,* this Arbitration Agreement (in its negotiation, execution, administration, modification, extension or enforcement), or any other agreement entered into by and/or among the operator, dealer company, and/or GM, including any GM Dealer Sales and Service Agreements whether executed before or after this Arbitration Agreement, (collectively, the "Claims") that arise at any time before or during the period whi GM is an investor in dealer company and claims which may be raised in class action litigation.

2. Proceedings below

Petitioner filed his Complaint against Respondent pursuant to the ADDCA in the United States District Court for the Southern District of New York on July 15, 2005 seeking damages for breach of contract, breach of the implied obligation of good faith and fair dealing, fraud, breach of fiduciary duty and engaging in acts of discrimination based on race, color or national origin in the making and enforcement of a private contract.

On or about August 5, 2005, Respondent filed a Demand for Arbitration.

On or about August 25, 2005, Petitioner filed a Motion to Stay Arbitration.

On November 10, 2005, the District Court, in a decision by Judge Harold Baer, Jr., granted Petitioner's motion and denied the Respondent's Motion to Compel Arbitration on the grounds that the Motor Vehicle Franchise Contract Arbitration Fairness Act, 12 U.S.C. 1226, prohibits a manufacturer from compelling a dealer to arbitrate a controversy without the consent of the dealer after the controversy arises.[1,2]

---

[1] 12 U.S.C. 1226, fully set forth at page 25a of the Appendix, provides in pertinent part as follows.

> Motor vehicle franchise contract dispute resolution process.
> (a) Election of arbitration
> (1) Definitions. For purposes of this subsection--
> (A) the term "motor vehicle" has the meaning given such term in section 30102(6) of Title 49; and
> (B) the term "motor vehicle franchise contract" means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.
> (2) Consent required. Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.
> (3) Explanation required. Notwithstanding any other provision of law, whenever arbitration is elected to settle a dispute under a motor vehicle franchise contract, the arbitrator shall provide the parties to such contract with a written explanation of the factual and legal basis for the award.

[2] Though the MFVCAFA applies only to contracts that were entered into, amended, altered, modified ... after November 2, 2002, both the Second Circuit and the District Court found that the agreement

In so holding, the District Court rejected General Motors contention that the franchise arrangement consisted only of the Dealer Sales and Service Agreement between General Motors and Douglaston Chevrolet-Geo, Inc. because "nowhere in the ADDCA (which the MVFCAFA supplements) is a franchise limited to one piece of paper. Taking into account the policy behind the ADDCA and the fact that this is a remedial statute that should be construed broadly, Congress did not intend to limit the definition of motor vehicle franchise contract so as to exclude instances like this where the corporate structure is not strictly a franchise agreement in form but closely resembles one in substance."

The Respondent appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. A three-judge panel reversed the District Court's decision and held that "by its plain language, the MVFCAFA does not apply to the Amended Stockholders Agreement." The panel further held that the Dealer Sales and Service Agreement and the Amended Stockholders Agreement cannot be read as one contract because the parties to the contracts are different, the contracts are not mutually dependent, they do not refer to each other, and they serve different purposes.

---

between the parties was modified when the "Area of Primary Responsibility" of the dealership was changed by a letter from General Motors on December 31, 2002, and that the agreement was thereby modified on that date.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL APPELLATE COURTS AND WITH FEDERAL DISTRICT COURTS IN OTHER CIRCUITS

While other Courts of Appeals have yet to interpret the applicability of the MVFCAFA, the underlying rationale for the Second Circuit's decision conflicts with the holdings of other Courts of Appeals concerning the ADDCA, of which the MVFCAFA serves to augment in order to address deficiencies in the original statute[3].

The holding of the Second Circuit can be broken down into two parts. The first is its determination that the agreement labeled the "Amended Stockholders Agreement" between General Motors and Arciniaga is not a contract that meets the definition of a contract covered by the MVFCAFA. The second is the determination by the Second Circuit that the agreements between the

---

[3] The Motor Vehicle Franchise Contract Arbitration Fairness Act Report, S.REP.NO. 107-266(2002) states that "noting the imbalances in bargaining power inherent in the manufacturer-dealer relationship, in 1956 Congress enacted the Automobile Dealers Day in Court Act, 15 U.S.C. 1221-1225, to provide small business dealers with recourse in Federal court against manufacturer abuses irrespective of contract terms. This Federal statute serves as a precedent for Federal legislation to deal with problems in this area caused by disparities in bargaining power between manufacturers and dealers. However, the Automobile Dealers Day in Court Act has proved to be insufficient to level the playing field between dealers and manufacturers. The act does not provide for equitable relief and fails to address the 'one sidedness' of the motor vehicle franchise contract itself... the focus of S. 1140 is to make binding arbitration voluntary rather than mandatory, is fully consistent with the prominent theme that arbitration must be voluntary in court-annexed proceedings.

parties could not be read in their totality as a "motor vehicle franchise contract."

Underlying the second leg of the Second Circuit's decision is its determination that Arciniaga is not the dealer because it is the corporate entity, Douglaston Chevrolet-GEO, Inc., which is a signatory to the document labeled "Dealer Sales and Service Agreement." The agreements between the parties, the court reasoned, could not be part of one interrelated understanding because the named parties to the Amended Stockholder's Agreement were Arciniaga and General Motors while the named parties to the Dealer Sales and Service Agreement were Douglaston Chevrolet-GEO, Inc. and General Motors. However, the logical consequence of this reasoning is that Arciniaga himself would have no cause of action against General Motors even under the ADDCA for a breach of the Dealer Sales and Service Agreement. The holding by the Second Circuit, therefore, directly conflicts with holdings in other Circuit Courts and in other United States District Courts.

Thus, in *Kavanaugh v. Ford Motor Company*, 353 F.2d 710 (7th Cir. 1965), the Court considered who it was that Congress intended to protect in passing the ADDCA[4]. The court in *Kavanaugh* decided correctly that it was the individual dealers who were deemed essential to the dealership who Congress intended to protect.

Kavanaugh had entered into the Ford Motor Company Dealer Development Program much like Arciniaga who entered into the General Motors Minority Dealer Development Program. The arrangements were

---

[4] The Court is respectfully referred to page 24a of the Appendix for the text of the ADDCA.

similar, with Ford initially having the controlling interest in the corporate entity formed as the nominal automobile dealership. A feature of both plans was that Kavanaugh and Arciniaga, respectively, were designated as the "Dealer Operator" of the dealership and served as President. Another feature of the plans was the gradual transfer of the interest in the corporate entity from the manufacturer to the individual dealer operator. A Dealership Sales and Service Agreement was entered into between the corporate entity and the manufacturer in which the individual dealers signed on behalf of the corporate entity, and in which it was provided that the very existence of the dealerships was conditioned upon the qualifications of Kavanaugh and Arciniaga, respectively.

Ultimately a dispute arose in *Kavanaugh* that mirrors the dispute between General Motors and Arciniaga. Like General Motors, Ford contended that the Dealership Sales and Service Agreement was between it and the corporate entity and that it was the corporate entity that was protected by the Act. The Fifth Circuit rejected Ford's position. It pointed out that it was clear "that Kavanaugh was not regarded merely as someone who desired to invest in a business enterprise or as someone being employed to manage a dealership." The Court further pointed out that it was "obvious that Kavanaugh was deemed essential to the operation of the Dealership". Significantly, as in the instant case, the parties set forth in writing that the Dealer Sales and Service Agreement was being entered into in reliance upon the representations as to the qualifications of the dealer operator and that the dealer operator would have full managerial authority and responsibility for operating the dealership.

The Court in *Kavanaugh* therefore held that "notwithstanding the fact that the corporate format may be legally unassailable in other situations, its vulnerability is exposed when the purposes of the Dealers Day in Court Act and its legislative history are considered."

As in *Kavanaugh,* the corporate format established by General Motors in the instant case, if given recognition, would insulate General Motors from ever being obligated to comply with the MVFCAFA when it comes to disputes involving the continued right of the dealer operator - who actually operates, manages, and assumes responsibility for the performance of and ultimately attains a 100% equity interest in the dealership - to maintain his status as a dealer. Whether contractual provisions concerning this subject matter are contained in a document labeled "Stockholder's Agreement" or in a document labeled "Dealer Sales and Service Agreement" is, in itself, clearly not dispositive on whether disputes over these provisions are governed by the MVFCAFA.

With respect to the separate writings involved in the plan[5], the court in *Kavanaugh* held that, "each constitutes an inseparable part of the mutual understanding between Kavanaugh and Ford. We do not think that the word "franchise" as used in the Act need be restricted to a single document."

---

[5] The writings in *Kavanaugh* consisted of a Dealer Development Contract – the purpose of which is essentially the same as the Amended Stockholder's Agreement in the instant case - a Dealer Sales Agreement, and a Management Contract. In the instant case, the writings consisted of the Amended Stockholder's Agreement, a Dealer Sales and Service Agreement, and a side Arbitration Agreement.

The Fifth Circuit Court of Appeals has followed Kavanaugh in holding that the dealer whom Congress intended to protect by the passage of the ADDCA[6] is the individual dealer operator and not the corporate entity established by the manufacturer. In *York Chrysler-Plymouth, Inc. v. Chrysler Credit Corporation,* 447 F.2d 786 (5th Cir. 1971), in a case involving a similar transaction to the transaction in the instant case, the court held that "having thus visited upon the Yorks the personal responsibility for keeping the franchise viable, Chrysler Motors cannot now successfully maintain that they should be denied the benefits provided to dealers by the Dealers Day in Court Act. The trial court properly denied all moves to dismiss the individual Yorks as parties plaintiff." As with Arciniaga and Kavanaugh, the court in *York* noted that the Yorks were "made essential to [the] operation of the dealership by the agreement with Chrysler Motors."

Similarly, in *Rea v. Ford Motor Company*, 497 F.2d 577 (3rd Cir. 1974) the Third Circuit held that the individual dealer operator had a cause of action under the ADDCA against Ford for coercing him to surrender the franchise, reasoning that the dealer operator was made essential to the operation of the dealership by the terms of

---

[6] The Second Circuit makes much of the fact that the definition of "franchise" under the main section of the ADDCA is different from the definition of "Motor Vehicle Franchise Contract" under the supplement to the ADDCA, the MVFCAFA. As more fully set forth in Section 2, infra, there is nothing found in the Congressional Record which indicates that Congress intended to make this supplementary provision more limited than the main provisions of the ADDCA. More importantly, a close analysis of the language of the MVFCAFA defining "Motor Vehicle Franchise Contract" and the other language in that statute reveals that the breadth of controversies covered by the MVFCAFA is at least as wide-ranging as those covered by the ADDCA.

the Dealer Agreement. See also, *Lewis v. Chrysler Motors Corporation*, 456 F.2d 605 (8th Cir. 1972) (holding that the individual who operated the dealership, though not maintaining an equity interest in the automobile dealership was entitled to sue under the ADDCA because the term "automobile dealer" should be given the construction that best serves the congressional purpose of balancing the power heavily weighted in favor of automobile manufacturers).

Recently, the United States District Court for the Northern District of Illinois followed *Kavanaugh* and *York* on both the issue of whether an individual dealer-shareholder who is essential to the operation of the dealership (but where the manufacturer had the controlling voting interest in the entity formed as the "dealership") is the real party who is protected by the ADDCA rather than the corporate entity, and the issue of whether a stock purchase agreement is part of the franchise agreement that is governed by the ADDCA. That court, in *Equipoise PM, LLC v. International Truck and Engine Corp.*, 2006 WL 1594077 (N.D. Ill. 2006), held that because the stock purchase agreement "explicitly ties Equipoise's right to purchase ITEC's JPI [the corporate entity formed as the automobile dealership] stock to the dealership's success", the "stock purchase and dealer agreements in this case are and inseparable part of the understanding between the parties." (quoting from *Kavanaugh*, supra, 353 F.2d, at 715).

A similar reasoning should be applied to the deal between Arciniaga and General Motors since the Amended Stockholder's Agreement ties Arciniaga's rights to the dealership's success. [7]

---

[7] See page 5, infra.

The holding of the Northern District Court of Illinois in *Equipoise PM* is clearly at odds with the Second Circuit's holding in this case in that if the *Equipoise PM* court followed the Second Circuit, it would necessarily have found against the plaintiff and held that the stock purchase agreement and the dealer agreement were separate, non-integrated agreements.

The opinion of the Second Circuit, therefore, cannot be reconciled with the decisions of Courts of Appeals and District Courts in other circuits which held that the dealer operator is the real party in interest under the ADDCA where the manufacturer sets up a corporate entity under the circumstances that exist between Arciniaga and General Motors, and that the Dealer Sales and Service Agreement between the manufacturer and such corporate entity should be read together with other agreements between the manufacturer and the dealer operator as reflecting one integrated understanding between the dealer operator and the manufacturer.

II. THE DECISION BELOW MISCONSTRUES THE LANGUAGE OF THE MVFCAFA THEREBY UNDERMINING THE INTENT OF CONGRESS

The decision of the Second Circuit undermines the policy behind the ADDCA and the MVFCAFA in that it would allow manufacturers to simply provide for the rights and obligations between themselves and dealers not in provisions contained in writings labeled "Dealer Agreement" but in provisions contained in other writings labeled "Stockholder Agreement" or "Arbitration Agreement."

The opinion of the Second Circuit further undermines the policy behind Congress's restriction on manufacturers' ability to compel the arbitration of disputes in that it limits the relevance of MVFCAFA to disputes involving the day to day operation of dealerships and renders it inapplicable to disputes involving the ability of dealers to maintain the franchise – clearly not what Congress intended.

By finding that the entire understanding, as reflected by the Dealers Sales and Service Agreement, the Amended Stockholders Agreement, and the Arbitration Agreement, was not governed by the MVFCAFA and that only the Dealer Sales and Service Agreement was governed by it, the Second Circuit frustrated the intent of Congress. The primary goal of Congress was not to target writings labeled "Dealer Agreement", but to target side agreements between the parties, specifically side arbitration agreements like the one entered into between Arciniaga and General Motors. See the Motor Vehicle Franchise Contract Arbitration Fairness Act Report, S.REP.NO. 107-266(2002)[8]. As Judge Harold Baer, Jr. pointed out in the decision of the District Court below, the Committee Report shows that Congress sought to cover circumstances like those in the instant case.

> Today, almost every major motor vehicle manufacturer uses mandatory binding arbitration either in the dealer franchise contract or in side contracts with certain dealers. Manufacturers increasingly are inserting mandatory binding arbitration clauses in non-negotiated side contracts with dealers such as those governing dealer financed disputes and incentive disputes.

---

[8] Reprinted in full in the Appendix at page 27a.

Congress is clearly concerned about manufacturers using side agreements to sidestep the ADDCA and therefore intended to capture them within the purview of the statute. Such a side arbitration agreement was entered into between Arciniaga and General Motors, which, according to its terms, related both "to operator investments or attempts to invest in dealer company" and "the business operations of the dealer company"[9]

In reviewing the Senate Report it is clear that the restriction on manufacturers' ability to compel dealers to submit controversies to binding arbitration was intended to apply to controversies involving ownership and control of the dealership as well as to controversies relating to the day to day operations of the dealership. The Committee report states as follows:

> As discussed below, Congress has acknowledged that a motor vehicle dealer, after making a tremendous investment, depends completely upon the manufacturer to survive and prosper. For example, manufacturers can determine the dealers stock with the allocation of hot selling models,

---

[9] Significantly, the Second Circuit seems to have ignored the fact the Arbitration Agreement at issue was in a separate writing and not contained in the Amended Stockholders Agreement or the Dealers Sales and Service Agreement. In fact, the language of the parties' Arbitration Agreement lends further support to the fact that all three writings between Arciniaga and General Motors were part of one inseparable and integrated understanding between them in that the Arbitration Agreement specifically ties both of the other writings together as part of one deal. By its terms, the Arbitration Agreement was made applicable to all of the disputes between Arciniaga and General Motors relating to the dealership. The Court is respectfully referred to pages 5-6, infra, for the text of the binding arbitration provision between the parties.

> manufacturers can accelerate or delay warranty payments with great discretion, or alter the road paved for certain types of work that the dealer performs to honor the manufacturer's warranties, and manufacturers can limit dealers' rights to transfer ownership or control of the dealership..."

The provision at issue which General Motors contends is not subject to the MVFCAFA involves Arciniaga's ability to maintain and increase his ownership rights in the dealership and is clearly a subject matter intended by Congress to be governed by the MVFCAFA. That provision, which was arbitrarily set forth by General Motors in the writing labeled "Amended Stockholder Agreement" rather than in the writing labeled "Dealer Sales and Services Agreement" (despite that provisions dealing with this subject matter are often contained in Dealer Sales and Service Agreements) states as follows:

> 3.1 Time and Manner of Exercise. The Operator hereby grants the investor the option (the "Investors Stock Option") to purchase the common stock from the operator at the price and on terms described below. The Investor may exercise (but is under no obligation to exercise) the Investors Stock Option at any of the following times: (e) at any time on or prior to the last day of the second month after the date of any balance sheet of the dealer company which the dealer company is required to deliver under Article 3 of its By-Laws if, it is determined from the balance sheet, the dealer company has a "unrecovered loss" (as that term is defined in the Dealer Company's Certificate of Incorporation) which exceeds $200,000.00.

What this provision means, in substance, is simply that General Motors may oust Arciniaga and terminate his rights as a dealer under certain circumstances including the circumstances relating to the performance of the dealership under subparagraph "e". Therefore, this is clearly a provision that ties General Motors rights to terminate Arciniaga as a dealer to the performance of the dealership –a subject matter typically contained in dealer sales and service agreements, and also specifically mentioned in the Senate Report, and thus clearly subject to the MVFCAFA. While the Second Circuit found that the Amended Stockholders Agreement and the Dealer Sales and Service Agreement "serve different purposes", the circumstances upon which the manufacturer can terminate the dealer's rights - found in the "Amended Stockholder's Agreement" - is clearly subject to the MVFCAFA.

That the MVFCAFA is not limited in its applicability to the narrow subject matter of the mechanics of manufacturers and dealers selling and servicing motor vehicles is stated in the language of the statute itself. The Second Circuit misconstrued the language of the statute in holding otherwise. (And by so misconstruing the language of the statute thwarted the intent of Congress)

First, the Second Circuit reasoned that "the Amended Stockholders Agreement is not an agreement *by* which GM sells motor vehicles to any other person for resale to the ultimate purchaser." However, the statute does not define a "Motor Vehicle Franchise Contract" in this manner. The statute defines a Motor Vehicle Franchise Contract as "a contract *under* which a motor vehicle manufacturer... sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes

such person to repair and service the manufacturer's motor vehicles."

If the Amended Stockholders Agreement and the Arbitration Agreement between the parties cannot be deemed agreements *by* which General Motors sells motor vehicles to the Dealer for resale to an ultimate purchaser, they may, however, be deemed agreements *under* which General Motors sells motor vehicles to the dealer for resale to the ultimate purchaser.

Moreover, even if a Motor Vehicle Franchise Contract can be narrowly defined as consisting of only those contractual provisions "by" which manufacturers and dealers sell and service motor vehicles, the statute would still govern the controversy at issue relating to Arciniaga's right to maintain his standing as a dealer. The statute restricts the manufacturer's right to compel arbitration not only of controversies over the performance of a "motor vehicle franchise contract" but also controversies "arising out of or relating to such contract." The words "or relating to" would be rendered superfluous if the statute restricted the manufacturer's right to compel arbitration only for disputes on the subject of selling and servicing motor vehicles in its narrowest sense [10].

---

[10] In one of the few cases construing the MVCFACA rather than the main provisions of the ADDCA, *Daimler Chrysler Vans, LLC v. Freightliner of New Hampshire*, 2004 WL 51314(D.N.H.2004), although unreported, the Court emphasized that although the dispute between the parties was not an alleged breach of the dealer agreement itself, it "arose from or related to" the dealer agreement. Thus, in this respect the Second Circuit's decision would have caused confusion to the Court in *DaimlerChrysler Vans* and will cause confusion for any future case on this issue. It is for this further reason that this Court should clarify this issue.

At the very least, the language of the statute is not as clear and plain as the Second Circuit maintains. Therefore, the Second Circuit should have, *but explicitly did not, consider the congressional intent and purpose of the statute* in rendering its decision.

In reviewing the language of the MVFCAFA it is, at the very least, arguable whether or not it applies only to controversies arising from the narrow mechanics of motor vehicles being bought and sold and serviced, or whether it also applies to controversies relating to "selling motor vehicles" in a broader sense, for example, the way General Motors markets its motor vehicles and establishes franchises to sell them – which would obviously include the relationship between General Motors and its dealer operators. Therefore, the Second Circuit was incorrect when it ignored the congressional intent and purpose of the MVFCAFA. By so ignoring Congress' intent, the Second Circuit thwarted the clear intent of Congress.

Absent a review by this Court, the Second Circuit's decision will lead to confusion in the application of the ADDCA and the MVFCAFA among the Federal Courts and raise serious questions about the viability of the Fifth Circuit's decision in Kavanaugh and its progeny in the other Federal Circuits.

Furthermore, the Second Circuit's decision to ignore Congress's intent - on the erroneous grounds that the language of the MVFCAFA is clear and plain in limiting its applicability - if allowed to stand, will lead the Federal Courts to undermine the intent of Congress in passing the MVFCAFA, namely, to protect dealers, in light of their diminished bargaining power, from being compelled to submit its controversies with manufacturers to binding arbitration.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Petition for a Writ of Certiorari be granted.

November 1, 2006

Respectfully submitted,

LEONARD A. BELLAVIA
Counsel of Record
BARRY M. WEISS
BELLAVIA GENTILE
& ASSOCIATES LLP
200 Old Country Road
Mineola, New York 11501
Tel: (516) 873-3000
Fax: (516) 873-9032

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2005

(Argued: June 12, 2006 Decided: August 8, 2006)

Docket No. 05-6299-cv

ANTHONY L. ARCINIAGA,
Plaintiff-Appellee,

-v.-

GENERAL MOTORS CORPORATION,
Defendant-Appellant.

Before: MCLAUGHLIN and RAGGI, Circuit Judges, and KARAS, District Judge.*

General Motors Corporation appeals from the denial of a motion to compel arbitration and the grant of a motion to stay arbitration by the United States District Court for the Southern District of New York (Baer, J.).

REVERSED.

JAMES C. McGRATH, Bingham McCutchen LLP, Boston, MA (Carol E. Head and Diane C. Hertz, on the brief), for Defendant-Appellant.

STEVEN H. LaBONTE, Bellavia Gentile & Associates,

---

* *The Honorable Kenneth M. Karas, of the United States District Court for the Southern District of New York, sitting by designation.*

LLP, Mineola, NY (Leonard A. Bellavia, Stephen A. Somerstein, and Christine Staiano, on the brief), for Plaintiff-Appellee.

MCLAUGHLIN, Circuit Judge:

This case arises from a dispute between Anthony L. Arciniaga and General Motors Corporation ("GM"). The merits of that dispute, however, are not today's concern. Instead, our task is to determine if the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002 (the "MVFCAFA") limits GM's ability to enforce its arbitration agreement with Arciniaga. The district court found that it does. We find that it does not. Thus, we reverse the district court's denial of GM's motion to compel arbitration and its grant of Arciniaga's motion to stay arbitration.

BACKGROUND

Through its Motor Holdings program, GM co-invests in car dealerships with individuals who lack the capital to open a dealership on-their own. GM contributes as much as eighty-five percent of the necessary capital in exchange for the preferred stock of the dealership, which is organized as a corporation. The individual provides the remaining necessary capital in exchange for common stock in the dealership, and assumes responsibility for the dealership's day-to-day operations. If all goes smoothly, the dealership redeems GM's preferred stock through its profits until only the common stock remains, leaving the individual operator as the sole owner of the dealership.

Through the separate but related Minority Dealer Development program, GM provides training and additional financial support to minority Motor Holdings program candidates. GM frequently donates additional capital to dealerships participating in the Minority Dealer Development program in order to reduce the number of preferred shares that the dealerships must ultimately redeem.

At some point in the mid-1990s, GM accepted Arciniaga into the Motor Holdings and Minority Dealer Development programs. GM had already purchased Douglaston Chevrolet-Geo, Inc. (d/b/a Bay Chevrolet), a dealership in Douglaston, New York, from its previous owner. GM and Arciniaga intended that Arciniaga would become the President and eventual sole owner of Bay Chevrolet through the Motor Holdings and Minority Dealer Development programs.

In December 1995, GM, Arciniaga, and Bay Chevrolet entered into a Stockholders Agreement. Pursuant to the terms of the agreement, Bay Chevrolet issued 2,100 shares of common stock and 11,900 shares of preferred stock. GM purchased all of the preferred stock for $1,190,000. Arciniaga purchased Bay Chevrolet's common stock for $210,000, $125,000 of which came from a GM loan. The Stockholders Agreement provided that GM could purchase all of Bay Chevrolet's common stock if at any point the dealership suffered losses that exceeded $280,000. The agreement also provided that all questions concerning its construction, validity, and interpretation were to be governed by New York law.

Around the same time, GM and Bay Chevrolet entered into a separate Dealer Sales and Service Agreement (the "Dealer Agreement"). Every GM

dealership enters into this form agreement regardless of whether its operator participates in the Motor Holdings or Minority Dealer Development programs. Under the terms of the Dealer Agreement, GM authorized Bay Chevrolet "to sell and service [GM] products" and promised to supply Bay Chevrolet with motor vehicles and to provide training for the dealership's employees. Bay Chevrolet, for its part, pledged to promote, sell, and service GM products. The Dealer Agreement provided that disputes arising from the agreement should be submitted to non-binding arbitration. The agreement is governed by Michigan law, and GM and Bay Chevrolet renewed it in November 2000. Significantly, Arciniaga is not a party to the Dealer Agreement.

In October 1999, for reasons not pertinent to this dispute, GM, Arciniaga, and Bay Chevrolet agreed to a reorganization plan that altered the terms of their investment relationship. Under this plan, they agreed to terminate the 1995 Stockholders Agreement and to enter into a new Stockholders Agreement (the "Amended Stockholders Agreement"). The Amended Stockholders Agreement reduced the loss amount that would trigger GM's right to purchase Bay Chevrolet's common stock from $280,000 to $200,000.

Both the reorganization plan and the Amended Stockholders Agreement required GM, Arciniaga, and Bay Chevrolet to enter into a binding Arbitration Agreement, which they did in October 1999. By the terms of the Arbitration Agreement, each party waived its right to a jury trial and agreed to submit to mandatory and binding arbitration any claims arising from or related to, inter alia, Arciniaga's investment in Bay Chevrolet, the business decisions or practices of any of the parties, and any other agreement entered into by the parties, including any Dealer

Sales and Services Agreement executed before or after the Arbitration Agreement. The Arbitration Agreement also provided that the Federal Arbitration Act (the "FAA") governs the interpretation, enforcement, and conduct of the arbitration, but Michigan law governs all matters that the FAA does not cover.

By February 2005, Bay Chevrolet was reporting losses well over $200,000, thereby triggering GM's option to purchase all of the dealership's common stock. In March 2005, GM notified Arciniaga that it was exercising that option. After Arciniaga refused to resign as President of Bay Chevrolet, GM exercised its right to remove him. In June 2005, GM issued Arciniaga a check for the value of the common stock.

In July 2005, Arciniaga sued GM in the United States District Court for the Southern District of New York (Baer, J.). His complaint alleges claims for (1) discrimination in the making or enforcement of contracts in violation of 42 U.S.C. § 1981; (2) violation of the Automobile Dealers Day in Court Act (the "ADDCA"), 15 U.S.C. § 1222; (3) breach of contract; (4) breach of the covenant of good faith and fair dealing; (5) breach of the fiduciary duty owed by a majority shareholder to a minority shareholder; and (6) fraud.

In August 2005, GM filed a demand for arbitration with the American Arbitration Association. Arciniaga countered with a motion in the district court for a preliminary injunction staying arbitration. GM filed a cross-motion to compel arbitration and to stay the district court action. The district court granted Arciniaga's motion to stay arbitration and denied GM's motion to compel arbitration. See Arciniaga v. General Motors Corp., 418 F. Supp. 2d 374 (S.D.N.Y. 2005).

GM now appeals.

DISCUSSION

GM argues that the district court erred by granting Arciniaga's motion to stay arbitration and denying GM's motion to compel arbitration. We agree.

We have jurisdiction. The FAA permits interlocutory review of both a denial of a motion to compel arbitration, 9 U.S.C. § 16(a) (1) (C), and a stay of arbitration, Id. § 16(a) (2). We review de novo the district court's determination. LAIF X SPRL v. Axtel, S.A. de C.V., 390 F.3d 194, 198 (2d Cir. 2004).

Dating "back to those days when the English judges opposed any innovation that would deprive them of their jurisdiction," Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 24 (2d Cir. 1995), courts once possessed a "hostility" towards arbitration agreements, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). Congress passed the FAA to tame that antipathy. Id. Now, it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we "have often and emphatically applied." Leadertex, 67 F.3d at 25.

The FAA provides that an agreement to arbitrate is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Thus, the burden lies with the party attempting to avoid arbitration "to show that Congress intended to

preclude a waiver of a judicial forum" for his claims. Gilmer, 500 U.S. at 26 (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).

Here, there is no dispute that Arciniaga and GM entered into a binding arbitration agreement; and there is no denying that their current disagreement falls within the scope of that agreement. The parties do dispute, however, whether Congress intended claims such as Arciniaga's to be nonarbitrable.

Arciniaga claims, and the district court agreed, that the MVFCAFA limits the availability of arbitration in this case. The MVFCAFA, a 2002 amendment to the ADDCA, states:

> Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.

15 U.S.C. § 1226(a)(2).

By its terms, the MVFCAFA applies only to "motor vehicle franchise contracts." Id. The statute does not affect arbitration agreements in other types of contracts, even if they touch on the relationship between an automobile manufacturer and a car dealership. The statute defines "motor vehicle franchise contract" as "a contract under which a motor vehicle manufacturer, importer, or distributor sells

motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles." Id. § 1226(a)(1)(B).

At oral argument, Arciniaga's counsel conceded that the complaint alleges only a breach of the Amended Stockholders Agreement and not a breach of the Dealer Agreement. Moreover, the complaint confirms that the entirety of Arciniaga and GM's dispute relates to their investment relationship, which, of course, is governed by the Amended Stockholders Agreement. The essential question, then, is whether the Amended Stockholders Agreement is a "motor vehicle franchise contract." We conclude it is not.

The Amended Stockholders Agreement is not an agreement by which GM "sells motor vehicles to any other person for resale to an ultimate purchaser." Nor does the agreement authorize anyone "to repair and service" GM motor vehicles. Thus, by its plain and unambiguous language, the MVFCAFA does not apply to the Amended Stockholders Agreement. See Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993) ("[A] court should presunn that the statute says what it means."); see also Pride v. Ford Motor Co., 341 F. Supp. 2d 617, 621 (N.D. Miss. 2004) (finding that an automobile dealership investment and employment contract was not a "motor vehicle franchise contract").

Congress's decision to define separately within the statute "motor vehicle franchise contract" buttresses our reading of the plain language of the MVFCAFA. The ADDCA, of which the MVFCAFA is a part, defines "franchise" as "the written agreement or contract between any automobile manufacturer engaged in commerce and

any automobile dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract." 15 U.S.C. § 1221(b). This definition is broader than the MVFCAFA's definition of "motor vehicle franchise contract." That Congress elected to separately define "motor vehicle franchise contract" instead of using a preexisting, more broadly defined, term counsels against expansively construing the more narrowly defined term. Cf. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

Arciniaga suggests two routes to circumvent the plain language of the MVFCAFA. First, he points to the legislative history of the MVFCAFA. Second, he contends that all the agreements involving himself, GM, and Bay Chevrolet should be read as one agreement. These arguments are unavailing.

To be sure, as the district court recognized, some of the MVFCAFA's legislative history lends support to Arciniaga's argument. According to the Senate Judiciary Committee's report, Congress passed the statute because it was concerned that "[m]anufacturers increasingly are inserting mandatory binding arbitration clauses in non-negotiated side contracts with dealers, such as those governing dealer finance disputes." S. Rep. No. 107-266 (2002). Thus, Congress might well have been concerned about situations such as Arciniaga's. Nevertheless, Congress did not capture Arciniaga's plight in the plain and unambiguous language of the MVFCAFA.

When a statute's language is clear, our only role is to

enforce that language "'according to its terms.'" Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S. Ct. 2455, 2459 (2006) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000)). We "do not resort to legislative history to cloud a statutory text that is clear" even if there are "contrary indications in the statute's legislative history." Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994); see also Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (internal quotations and citations omitted)). Because we have determined that the language of the MVFCAFA is clear and unambiguous, we need not - and thus do not -consider the statute's legislative history.

Arciniaga's second argument is equally unavailing. He contends, based on state contract law, that all the agreements between himself, GM, and Bay Chevrolet are part of a "non-severable package," and from that package there emerges a "motor vehicle franchise contract." Resort to state law in this fashion is not unlike trying to fit the step-sister's foot into Cinderella's shoe. Such a practice would likely abandon "motor vehicle franchise contracts" to the vagaries of different states' contract laws, an outcome potentially inconsistent with the "well-recognized interest in ensuring that federal courts interpret federal law in a uniform way." Williams v. Taylor, 529 U.S. 362, 389-390 (2000) (Stevens, J., concurring). In any event, we need not resolve this question.

New York law governs the Amended Stockholders Agreement, while Michigan law controls the Dealer Agreement. Under both states' law, multiple agreements

may be read as one contract only if the parties so intended, which we determine from the circumstances surrounding the transaction. See Rudman v. Cowles Commc'ns, Inc., 30 N.Y.2d 1, 13 (1972); Macomb County Sav. Bank v. Kohlhoff, 147 N.W.2d 418, 419 (Mich. Ct. App. 1967). The circumstances here do not evince an intent by the parties to interpret the Amended Stockholders agreement and the Dealer Agreement as one contract.

First, the parties to the Amended Stockholders Agreement and the Dealer Agreement are different. The former is between Arciniaga, GM, and Bay Chevrolet while the latter is between GM and Bay Chevrolet. Cf. Rudman, 30 N.Y.2d at 13 (finding that multiple contracts did not constitute one transaction because, inter alia, "the agreements involved formally different parties"); Skimin v. Fuelgas Co., 64 N.W.2d 666, 668-69 (Mich. 1954).

Second, the contracts are not mutually dependent. The Dealer Agreement is GM's standard dealership agreement, regardless of the financing of the dealership, and it does not necessarily end if the Amended Stockholders Agreement fails.

Third, the agreements are separate forms and they do not refer to each other. Cf. Rudman, 30 N.Y.2d at 13 ("Although form is not conclusive, that the parties entered into separate written agreements with 'separate assents' rather than a 'single assent' is influential."); Schonfeld v. Thompson, 663 N.Y.S.2d 166, 167 (1st Dep't 1997) (finding that written agreements that do not refer to each other are separate contracts); Forge v. Smith, 580 N.W.2d 876, 881 (Mich. 1998) ("Where one writing references another instrument for additional contract terms, the two writings should be read together.").

Finally, the agreements serve separate purposes. The Dealer Agreement governs the resale and servicing of GM vehicles by Bay Chevrolet (quintessential attributes of a "motor vehicle franchise contract"). The Amended Stockholders Agreement pertains to Arciniaga's and GM's investment relationship in Bay Chevrolet. Cf. Schonfeld, 663 N.Y.S.2d at 167 (agreements "serving different purposes" are not a single contract); Shirey v. Camden, 22 N.W.2d 98, 101 (Mich. 1946).

CONCLUSION

Arciniaga's brief bristles with a jeremiad about "small businessmen and businesswomen" compared to "large powerful multinational automobile manufacturers." He suggests that if we reverse the district court's decision, the proverbial little guy will not get his day in court. Of course, our decision today does no such thing. Arciniaga's claims will be heard, but they will be heard in the forum he agreed to and not in the forum he bargained away. See Mitsubishi Motors Corp., 473 U.S. at 628 ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

For the foregoing reasons, we reverse the district court's denial of GM's motion to compel arbitration and its grant of Arciniaga's motion to stay arbitration. The case is remanded to the district court to grant GM's motion to compel arbitration.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY L. ARCINIAGA,

Plaintiff, 05 Civ. 6426 (HB)

-against-

GENERAL MOTORS CORPORATION,

Defendant.

OPINION & ORDER

Hon. Harold Baer, Jr., District Judge*:

Before the Court are cross motions. Plaintiff Anthony L. Arciniaga ("Arciniaga") seeks an order to stay arbitration and Defendant General Motors Corporation ("GM") seeks an order to compel arbitration and stay this action. For the following reasons, Arciniaga's motion to stay arbitration is GRANTED.

I. BACKGROUND

In 1995, Arciniaga and GM, an automobile manufacturer, entered into an agreement to jointly invest in Douglaston Chevrolet-Geo, Inc. d/b/a Bay Chevrolet

---

* Anna Fontana, a fall 2005 intern in my Chambers, and currently a third-year law student at St. John's University School of Law, provided substantial assistance in the research and drafting of this Opinion.

("Bay Chevrolet"), a Delaware corporation operating a Chevrolet dealership in Douglaston, New York. The parties contemplated two main contracts to comprise the corporate structure. Under the first, a Stockholders Agreement, GM provided most of the necessary capital for the business and received 1 1,900 shares of preferred stock while Arciniaga contributed the remaining amount in exchange for 2,100 shares of common stock and assumed responsibility as President of the dealership in charge of the day-to-day operations. As the dealership became more profitable, Arciniaga could redeem the preferred shares of stock held by GM until he became the sole owner of the dealership. However, GM retained the right to purchase Arciniaga's common stock if the dealership suffered a loss of 20% of its original franchise capital. The second agreement, the GM Dealer Sales and Service Agreement ("Dealer Agreement"), was a standard contract between GM and the dealership, Bay Chevrolet. In 1999, GM and Arciniaga initiated an "Action by Board of Directors and Stockholders for Plan of Reorganization by Written Consent" to facilitate Arciniaga's immediate redemption of 4,000 shares of preferred stock. At that time, GM and Arciniaga amended the Stockholders Agreement to allow GM to buy Arciniaga's common stock if the dealership suffered losses in excess of $200,000, and to include a mandatory arbitration agreement covering all aspects of the investment relationship and operation of the dealership.

As of February 28, 2005, Bay Chevrolet reported losses in the amount of $293,236. This triggered GM's right to call the balance of Plaintiff s stock under the Stockholders Agreement, and on March 14, 2005, GM did just that. Arciniaga was also removed from his position as President of Bay Chevrolet. This obliterated any paternalism the Plaintiff may have been counting on

and on July 15, 2005, Arciniaga filed a complaint in this Court asserting claims relating to the Stockholders Agreement for discrimination, breach of express and implied contract rights, and fraud, pursuant to the Automobile Dealers' Day in Court Act ("ADDCA"), 15 U.S.C. §§ 1221-26 (2005).

II. DISCUSSION

The Defendant seeks to stay and proceed to arbitration. To determine if arbitration is mandated, the court must look at: 1) whether there was an agreement between the parties to arbitrate, 2) whether the agreement covered this particular dispute, and 3) whether Congress has enacted a federal statute to prohibit arbitration under the facts of this lawsuit. See Genesco, Inc. v. T. Kakiuci & Co., 815 F.2d 840, 844 (2d Cir. 1987).

An agreement to arbitrate was signed by the parties in 1999 when the Stockholders Agreement was amended. That agreement is broad enough to encompass the dispute now at issue. The question then requires a determination as to whether the limitation on arbitration in the ADDCA is applicable here. The ADDCA provides that whenever arbitration is contemplated in a motor vehicle franchise contract both parties must consent to arbitration after the dispute arises. See 15 U.S.C. § 1226(a)(2)("whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy"). Here, there was no consent by both parties thus the parties are not

required to submit to arbitration.

A. The Stockholder Agreement Between Investors Constitutes a "Motor Vehicle Franchise Contract"

GM argues that the ADDCA is not applicable to this case because Arciniaga only raises claims with regard to the Stockholders Agreement and not the franchise arrangement, which according to GM is only comprised of the Dealer Agreement made between Bay Chevrolet and GM. But situations like these are precisely what Congress contemplated when it enacted the ADDCA as a remedy to redress the disparity in economic power between automobile manufacturers and franchise dealers. Automobile Dealers' Day in Court Act, ch. 1038, 70 Stat. 1125 (1956) (codified as amended at 15 U.S.C. §§ 1221-1225 (2005). It is undisputed that the law was passed in an effort to remedy the unequal bargaining power that plagued the industry when contracts were made between individuals who wanted to own dealerships and large manufacturers who sought to retain power and control over the business. The ADDCA was intended to protect automobile dealers from unfair and coercive practices. See also Maschio v. Prestige Motors, 37 F.3d 908, 910 (3d Cir. 1994)(The ADDCA was passed to "redress the economic imbalance and unequal bargaining power between large automobile manufacturers and local dealerships, protecting dealers from unfair termination and other retaliatory and coercive practices.").

Section 1226(a)(l)(B) of the Act states that a '"motor vehicle franchise contract' means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for

resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles." Nowhere in the ADDCA is a franchise contract limited to one piece of paper. Taking into account the policy behind the ADDCA and the fact that this is a remedial statute that should be construed broadly, Congress did not intend to limit the definition of motor vehicle franchise contract so as to exclude instances like this where the corporate structure is not strictly a franchise agreement in form but closely resembles one in substance.

The ADDCA, as it stood prior to the addition of the Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226, failed to address the power of the manufacturers' bargaining power when dealing with the motor vehicle franchise contract itself. See The Motor Vehicle Franchise Contract Arbitration Fairness Act Report, S. REP. No. 107-266 (2002) (Comm. on the Judiciary). The Committee Report shows that Congress sought to cover situations like this.

> Today, almost every major motor vehicle manufacturer uses mandatory binding arbitration either in the dealer franchise contract or in side contracts with certain dealers. Manufacturers increasingly are inserting mandatory binding arbitration clauses in non-negotiated side contracts with dealers, such as those governing dealer finance disputes and incentive disputes.

Id. Congress was concerned about manufacturers using these side agreements to sidestep the ADDCA and, therefore, intended to capture them within the purview of the statute.

Other courts have recognized that multiple documents can create a franchise agreement under the ADDCA. For example, in Kavanaugh v. Ford Motor Co., 353 F.2d 710 (7th Cir. 1965), the court articulated the need to consider these documents together.

> Each dovetails into the other. Each constitutes an inseparable part of the mutual understanding between Kavanaugh and Ford. We do not think the word "franchise" as used in the [ADDCA] need be restricted to a single document. If other written agreements are so interwoven with the document ostensibly designated as the franchise as to affect materially the legal significance of the latter, they must be regarded as part of the franchise agreement.

Kavanaugh, 353 F.2d at 715. Although Kavanaugh was decided prior to the enactment of 15 U.S.C. § 1226, the same policy considerations apply. The amendment was added to further benefit the automobile dealer and not to place restrictions on the already-existing principles under the ADDCA. Here, the Dealer Sales and Service Agreement, the Shareholders Agreement, and other documents (the promissory note and the personal service contract) together made up the understanding between Arciniaga and GM. Collectively, these agreements made it possible for Arciniaga to become an automobile dealer and thus, all of the agreements should be viewed together to constitute a "motor vehicle franchise contract."

GM relies on decisions from other courts that have interpreted the ADDCA too narrowly. The court in Pride v. Ford Motor Co., 341 F. Supp. 2d 617 (N.D.

Miss. 2004), held that a similar set of agreements between the individual shareholder and the automobile manufacturer did not comprise a franchise arrangement. This view of the statute ignores its purpose and the policy behind the law, i.e. to protect individuals from large automobile corporations, and allows industry leaders to create a corporate structure that evades the rule. GM, and its actions in this case, is for me a little reminiscent of that great line form a well-known baseball team manager to the effect that some people are born on third base and think they've hit a triple.

B. The Contract was Validly Altered or Modified After § 1226 Came into Effect

The statute specifies that 15 U.S.C. § 1226(a) would apply only to disputes that arose under dealership franchise contracts "entered into, amended, altered, modified. renewed, or extended after the date of the enactment of this Act," November 2, 2002. Id. at § 1226(b)(emphasis added).

The Stockholders Agreement was last amended on October 20, 1999 to incorporate the arbitration provision, but GM altered and modified the Dealer Agreement in 2002, *after* the effective date of the statute. On November 20, 2002, Arciniaga received a letter from the Zone Manager of GM Dealer Contractual Group that stated that as of December 31, 2002, GM would reconfigure and revise each Area of Primary Responsibility ("APR") for all GM dealers. This change in APR re-defined both the geographic area in which the Plaintiff could sell GM products, and his bottom line.

The APR modification on December 31, 2002 altered and modified the original Dealer Sales and Service Agreement. GM argues that this is not a significant amendment and does not trigger the protections of the ADDCA. I disagree. Courts have held that less important events than this constituted an amendment to the franchise agreement. For example, in DaimlerChrysler Vans LLC v. Freightliner of New Hampshire, Inc., No. 03-304, 2004 U.S. Dist. LEXIS 316, at *2, *4-*5 (D.N.H. Jan. 8, 2004), the court determined that the Target Agreements that proposed an annual sales objective, and thus would be used to determine the franchisee's eligibility for bonuses, were considered amendments to the original contract for purposes of 12 U.S.C. § 1226(b). See id. at *5. Similarly, the modification made to the Dealer Sales and Service Agreement in this case affects the sales projections and profits of the dealership. Even if the Addendum is not considered an amendment to the agreement, it is beyond peradventure an alteration or modification and would trigger the protections afforded by the statute.

C. Arciniaga Can Bring Suit Under the ADDCA as an Individual

Under the provisions of the ADDCA, an "automobile dealer" is permitted to bring suit against a manufacturer who has failed to act in good faith in regard to a written franchise agreement. 15 U.S.C. §§ 1221-1225 (2005). The statute states that "'automobile dealer' shall mean any person, partnership, corporation, association, or other form of business enterprise . . . operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons." Id. at § 1221(c). GM argues that under

this definition, Bay Chevrolet would be considered the "automobile dealer," and not Arciniaga. But Arciniaga should also be considered a dealer for purposes of this lawsuit.

As a general rule, individual shareholders cannot bring suit in their own names for an injury suffered by the corporation where the individuals' only harm is solely through depreciation in the value of their shares of stock. See Vincel v. White Motor Corp., 521 F.2d 1113, 1120 (2d Cir. 1975). Although the Second Circuit declined to allow individual shareholders to bring a claim under the ADDCA in Vincel, the court acknowledged that there were exceptions to that rule, for example: 1) a duty is created from the special relationship between the shareholder and the defendant; 2) an action by the corporation provided no remedy to an injured shareholder; and 3) other situations that depended on the nature of the wrong alleged. See id. at 1118-19. The Second Circuit also pointed with approval to Kavanaugh v. Ford Motor Co., 353 F.2d 710 (7th Cir. 1965), where the circumstances were so compelling that the corporate entity needed to be disregarded entirely. See Vincel. 521 F.2d at 1120.

In Kavanaugh. an individual shareholder was entitled to sue Ford Motor Co. ("Ford") after it was determined that denying this right would negate the protective features of the ADDCA. The court held that it was necessary to look at the facts and circumstances of the situation to decide if the corporate veil should be pierced. See Kavanaugh, 353 F.2d at 717. There, because Ford owned all of the voting stock of the dealership and retained complete control of the dealership, Ford essentially was insulated from liability because Ford would never sue itself. See id. Kavanaugh

was essential to the operation of the dealership and therefore was entitled to the protections of the act in his individual capacity.

Similarly here, GM retained a controlling voting interest in Bay Chevrolet and also drafted the Shareholders Agreement to prohibit the corporate entity from initiating or taking part in any actions on behalf of Bay Chevrolet against GM. Having thus shielded itself from any claim by the corporate entity until Arciniaga could acquire a controlling interest, GM cannot also shield itself from any claim by Arciniaga asserting his rights as an individual shareholder, Arciniaga was an essential part of the dealership and, therefore, the fiction of the corporate entity will be set aside and Arciniaga may sue in his individual capacity.

IV. CONCLUSION

For the foregoing reasons, Arciniaga's motion to stay arbitration is GRANTED and Defendant's motion is DENIED. A Pre-Trial Conference will be held on Monday, November 21, 2005 at 3:30 P.M. The parties are instructed to consult with each other prior to the Pre-Trial Conference and, if possible, agree on a Pre-Trial Scheduling Order in advance of the Conference. The Clerk of the Court is instructed to close these motions and remove them from my docket.

SO ORDERED.
New York, New York
November 10, 2005

s/
U.S.D.J.

Effective: [See **Text Amendments**]

United States Code Annotated Currentness
Title 15 Commerce and Trade
"Chapter 27. Automobile Dealer Suits Against Manufacturers

§ 1222. Authorization of suits against manufacturers; amount of recovery; defenses

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

CREDIT(S)

(Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125.)

HISTORICAL AND STATUTORY NOTES
Revision Notes and Legislative Reports
1956 Acts. House Report No. 2850, see 1956 U.S. Code Cong, and Adm. News, p. 4596.

Effective: November 02, 2002

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 27. Automobile Dealer Suits Against Manufacturers

§ 1226. Motor vehicle franchise contract dispute resolution process

(a) Election of arbitration

(1) Definitions

For purposes of this subsection-

(A) the term "motor vehicle" has the meaning given such term in section 30102(6) of Title 49; and

(B) the term "motor vehicle franchise contract" means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.

(2) Consent required

Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.

(3) Explanation required

Notwithstanding any other provision of law, whenever arbitration is elected to settle a dispute under a motor vehicle franchise contract, the arbitrator shall provide the parties to such contract with a written explanation of the factual and legal basis for the award.

(b) Application

Subsection (a) of this section shall apply to contracts entered into, amended, altered, modified, renewed, or extended after November 2, 2002.

CREDIT(S)

(Pub.L. 107-273, Div. C, Title I, § 11028, Nov. 2, 2002, 116 Stat. 1835.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2002 Acts. House Conference Report No. 107-685 and Statement by President, see 2002 U.S. Code Cong, and Adm. News, p. 1120.

Codifications

This section was not enacted as part of Act Aug. 8, 1956, c. 1038, 70 Stat. 1125, which comprises this chapter.

Calendar No. 210
107TH CONGRESS
Report
SENATE

2d Session
107-266

--THE MOTOR VEHICLE FRANCHISE CONTRACT ARBITRATION FAIRNESS ACT

SEPTEMBER 10, 2002- Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 1140]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 1140) to amend chapter 1 of title 9, United States Code, to provide for greater fairness in the arbitration process relating to motor vehicle franchise contracts, having considered the same, report; favorably thereon, without amendment, and recommends that the bill do pass.

CONTENTS

		Page
I.	Purpose of legislation	2
II.	Legislative history	2
III.	Vote of the Committee	2
IV.	Background	2
V.	Need for legislation	5
VI.	Section-by-section analysis	9
VII.	Cost estimate	9
VIII.	Regulatory impact statement	10
IX.	Minority views of Senator Sessions	11
X	Changes in existing law	16

I. PURPOSE OF LEGISLATION

The Motor Vehicle Franchise Contract Arbitration Fairness Act, S. 1140, is a targeted amendment to the Federal Arbitration Act which requires that whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, arbitration may be used to settle the controversy only if both parties consent in writing after such controversy arises. This legislation would allow motor vehicle dealers the option of either going to arbitration or utilizing procedures and remedies available under State law such as those involving State-established administrative boards specifically created and uniquely equipped to resolve disputes between motor vehicle dealers and manufacturers. This legislation is intended to ensure that motor vehicle dealers are not required to forfeit important rights and remedies afforded by State law as a condition of obtaining or renewing a motor vehicle franchise contract.

II. LEGISLATIVE HISTORY

In the 106th Congress, legislation similar to S. 1140 was introduced by Senators Grassley and Feingold as S. 1020, the Motor Vehicle Franchise Contract Arbitration Fairness Act of 1999. The legislation was referred to the Committee on the Judiciary and given a hearing on March 1, 2000, in the Subcommittee on Administrative Oversight and the Courts, It was subsequently placed on the markup calendar on October 5, 2000, but no Committee action was taken. A similar measure, H.R. 534, was reported favorably by the House Committee on the Judiciary on September 13, 2000, by voice vote, and approved by the House of Representatives on October 3, 2000, by voice vote.

On June 29, 2001, Senator Orrin G. Hatch introduced S. 1140, the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, along with Senators Feingold, Grassley, Leahy, Warner, Breaux, Burns, Reid, Craig, Torricelli, Bennett, Snowe, DeWine, Thomas, and Hutchinson as original cosponsors. 1

[Footnote] On March 29, 2001, a similar measure, H.R. 1296, was introduced in the House of Representatives with over 30 original cosponsors. 2

[Footnote]

[Footnote 1: Since its introduction, S. 1140 has received exceptionally strong bipartisan support and is currently cosponsored by more than 60 Members of the Senate.]

[Footnote 2: H.R. 1296 is currently cosponsored by more than 200 Members of the House of Representatives.]

III. VOTE OF THE COMMITTEE

The Committee on the Judiciary, with a quorum present, met on Thursday, October 18, 2001, at 10 a.m., to consider S. 1140. The Committee ordered the Motor Vehicle Franchise Contract Arbitration Fairness Act to be reported favorably to the full Senate by voice vote, with one dissenting vote by Senator Sessions, with a recommendation that the bill do pass.

IV. BACKGROUND

Dealers of new motor vehicles are virtual economic captives of automobile manufacturers. Unlike some other franchisees, who may have a broad choice of franchisers with which to contract, new motor vehicle dealers may only obtain the right to merchandise and sell their product from an extremely limited group of manufacturers. As a result of the imbalance in bargaining power inherent in this relationship, manufacturers possess unparalleled leverage over dealers and potential franchisees. Motor vehicle manufacturers have historically, and do currently, require dealers to execute standard contracts of adhesion defining the manufacturer-dealer contract on a 'take it or leave it' basis. Additionally, manufacturers have broad discretion to allocate vehicle inventory and to control the timing for delivery of dealer stock. Manufacturers also exercise considerable control over the flow of revenue to dealers, such as warranty payments.

In recognition of the disparity in bargaining power between motor vehicle dealers and manufacturers, all States have enacted laws specifically designed to level the playing field between manufacturers and dealers and prevent unfair contract terms and practices. In fact, State laws govern nearly every aspect of the franchise contract

(except for the inclusion of arbitration clauses as discussed below). Motor vehicle franchise contracts and resulting disputes greatly affect the competitive distribution of vehicles which directly affects consumers as well as individual States' economies generally. In fact, the U.S. Supreme Court has held that State legislatures are constitutionally empowered to regulate the motor vehicle contractual relationship as a valid exercise of their police powers. *New Motor Vehicle Board* v. *Orrin W. Fox Co.,* 99 S. Ct. 403 (1978). As a result, dealers have clear and enforceable rights under State franchise laws. Generally, these State rights and procedures are nonwaivable, and contract terms that conflict with State law are routinely rendered unenforceable, irrespective of contract terms.

In 1987, many automobile and truck manufacturers began to include mandatory binding arbitration clauses in their dealer contracts. Mandatory binding arbitration clauses require that all disputes between the dealer and manufacturer be resolved by binding arbitration under the Federal Arbitration Act ('FAA'). These provisions ultimately require dealers to relinquish forums otherwise available under State law, including many of the State-established boards designed to regulate the relationship between dealers and manufacturers. Since dealers are unable to modify boiler-plate franchise contracts and delete the mandatory binding arbitration provisions, they have no choice but to accept such provisions as part of the standardized franchise contract or risk losing a business or prospective business.

Today, almost every major motor vehicle manufacturer uses mandatory binding arbitration either in the dealer franchise contract or in side contracts with certain dealers. 3

[Footnote] Manufacturers increasingly are inserting mandatory binding arbitration clauses in non-negotiated side contracts with dealers, such as those governing dealer finance disputes and incentive disputes. Many States, frustrated by the fact that mandatory binding arbitration provisions nullify their State statutes and procedures, have repeatedly attempted to enact laws to prohibit the inclusion of mandatory binding arbitration clauses in certain contracts. These State laws, however, have been universally preempted by the FAA.

[Footnote 3: These manufacturers utilizing mandatory binding arbitration in their dealer franchise contracts include: Bering Truck, DaimlerChrysler (which provided limited opt-out of arbitration by addendum), Freightliner Truck/DaimlerChrysler, Sterling Truck/DaimlerChrysler, Ferrari, Ford Dealer Development-principally with dealer development programs, General Motors Dealer Development--principally with dealer development programs, Saturn/GM, Hino Diesel--Toyota majority stock holder, Kenworth Truck, Nissan Diesel, Peterbilt Trucks, Suzuki, and Western Star.]

The Supreme Court articulated the preemptive effect of the FAA in *Southland Corporation v. Keating,* 104 S. Ct. 852 (1984). Chief Justice Burger, writing for the Court, stated that '[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.' Id. at 854.

In 1985, the Supreme Court further held that the FAA provided no basis for implying a presumption against arbitration of statutory claims or for departing from the Federal policy favoring arbitration in situations where a party bound by an arbitration agreement raises claims

founded on statutory rights. In the case *of Mitsubishi Motors Corporation* v. *Soler Chrysler-Plymouth,* 105 S. Ct. 3346 (1985), a motor vehicle dealer attempted to avoid the enforcement of a mandatory arbitration provision in its distribution agreement on the grounds that the enforcement of the arbitration clause would deprive the dealer of the ability to invoke its statutory right to bring an antitrust action under the Sherman Act. The Supreme Court was not persuaded by the argument that only contractual disputes, not statutory rights, should be determined through mandatory binding arbitration even when the claims presented are complex and carry as many public policy implications as a claim under the Sherman Act. Writing for the Court, Justice Blackmun stated that, '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum.' Id. at 3354. Thus, the Court implied that statutory rights are not infringed when adjudicated in an arbitral rather than a judicial forum.

Following this line of cases, the Federal preemption principle was specifically interpreted by the Fourth Circuit Court of Appeals to apply to contracts between motor vehicle dealers and manufacturers in 'Saturn Distribution Corp. v. *Williams,* 905 F.2d 719 (4th Cir. 1990). In 1989, Saturn filed suit against the Virginia Commissioner of Motor Vehicles when the Commissioner refused to approve Saturn's franchise contract. The Saturn Contract was rejected because it contained a mandatory binding arbitration clause in violation of the Virginia Motor Vehicle Licensing Act. Va. Code Ann. Sec. 56.1-515 et seq. That law specifically precludes any provision that denies access to the procedures, forums and remedies provided for under State law. The Commissioner had indicated to Saturn that he would approve the contract if it

gave the dealer the option to delete the exclusive arbitration clause, but that Saturn could not make the inclusion of that clause a prerequisite to becoming a dealer. Saturn declined to make these modifications. *Saturn Distribution Corp* v. *Williams,* 717 F. Supp. 1147, 1149 (E.D. Va. 1989).

At trial, the district court ruled in favor of the Commissioner. Id. at 1153. However, the fourth circuit, holding that the Virginia Motor Vehicle Licensing Act conflicts with the FAA and is preempted under the Supremacy Clause of the United States Constitution. The court relied on two Supreme Court decisions, *Southland,* 104 S. Ct. 852 (1984), and *Perry* v. *Thomas,* 107 S. Ct. 2520 (1987). The Supreme Court denied certiorari and let stand the mandatory binding arbitration provision in Saturn's dealer franchise contract.

V. THE NEED FOR LEGISLATION

In the majority of States, an agency is charged with administering and enforcing motor vehicle franchise law. 4

[Footnote] These State forums, boards, and commissions serve as efficient and cost-effective alternative dispute resolution systems for motor vehicle franchise disputes because State agencies have both expertise and experience in these matters. State motor vehicle administrative forums were specifically established for the public policy purpose of providing alternative dispute resolution mechanisms, but with the added features of important legal safeguards, particularly that of a right to appeal.

[Footnote 4: Arizona, Arkansas, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas,

Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin have such agencies.]

Additionally, most metropolitan motor vehicle dealer associations participate in nonbinding third-party dispute resolution programs designed to mediate disagreements between consumers and new car dealers and/or manufacturers. 5

[Footnote] The Automotive Consumer Action Program ('AUTOCAP') is one such program, voluntarily sponsored by franchised motor vehicle dealer associations and administered in accordance with national standards established by the National Automobile Dealers Association. 6

[Footnote] AUTOCAP is available in many States and in the District of Columbia. 7

[Footnote] Often, these programs are run in conjunction with the offices of State attorneys general.

[Footnote 5: Mandatory binding arbitration clauses are not prevalent in most dealer-consumer new car contracts except in Alabama, and some State associations actively discourage the practice.]

[Footnote 6: States with AUTOCAP programs are Arizona, California (San Diego), District of Columbia (MD and VA area), Hawaii, Illinois, Kentucky, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota,

Texas, and Vermont.]

[Footnote 7: Manufacturers including BMW, Honda/Acura, Isuzu, Jaguar, Mitsubishi, Nissan/Infiniti, and Volvo use the AUTOCAP resolution program.]

AUTOCAP dispute resolution begins with an effort at informal mediation. If informal mediation is unsuccessful, disputes are then mediated by a panel comprised of consumer representatives and motor vehicle dealers. The decision to accept or reject an AUTOCAP decision is at the sole discretion of the parties, and in all cases is nonbinding on the consumer. If dissatisfied with the outcome a consumer is free to pursue other types of legal recourse. The Council of Better Business Bureaus sponsors a similar program, Auto Line, in which manufacturers participate on a manufacturer-by-manufacturer basis.

The use of mandatory binding arbitration can be distinguished from State-established administrative boards and programs such as AUTOCAP and Auto Line in that mandatory binding arbitration does not allow for further judicial review. A dealer seeking to overturn an arbitration decision often cannot appeal the decision even when it is clear that the law has been misapplied. Arbitration also lacks the formal court-supervised discovery process often necessary to learn facts and obtain documents. Arbitrators generally have no obligation to provide a factual or legal basis for the decision in a written opinion, and the impartiality of arbitration providers may be affected by the knowledge that the manufacturer may be likely to bring them repeat business but the dealer is not. In addition, the fees required to initiate an arbitration proceeding can be prohibitive to a small business owner, particularly in contrast to State forums that may be otherwise available.

The inclusion of mandatory binding arbitration clauses in contracts between dealers and manufacturers also provides automobile manufacturers with an advantage in disputes with dealers because these clauses create an easy means by which to avoid State-established forums. For example, a dealer in Virginia, who believed he met all of Virginia's franchise requirements to remain a Sterling Truck dealer, had his franchise terminated by the manufacturer because of his refusal to comply with a unilateral contract modification that mandated 8-hour shifts in the dealership's parts and service department on Sundays and required the creation of a separate facility to house a new line of trucks. When the dealer sought a hearing before the Virginia Division of Motor Vehicles, the administrative body designated to hear these disputes, the request was denied because the dealer had been forced in his franchise contract to waive his rights under State law and submit to mandatory binding arbitration.

The dealer decided that due to the legal expense involved, fighting Sterling in arbitration was not economically feasible, and Sterling subsequently terminated his franchise despite his 42-year tenure as a heavy-duty truck dealer. Had the dealer not been forced to accept mandatory binding arbitration, he could have proceeded to the Virginia Division of Motor Vehicles dispute resolution forum, where, had State law been applied, he believes he would likely have successfully retained the franchise. 8

[Footnote]

/*Footnote 8:* See letter to Senator John Warner, dated March 14, 2000, from Charles M. Robertson, President of Magic City Motor Corp.]

Mr. William Shack, a California dealer and long-time member of the National Association of Minority Automobile Dealers, testified before the Senate Administrative Oversight and the Courts Subcommittee on March 1, 2000, about his adverse experience with mandatory binding arbitration with his automobile manufacturer, Saturn. After a substantial financial investment by Mr. Shack and his partner, Saturn unilaterally terminated their dealer contract and forced them into mandatory binding arbitration. Mr. Shack believed the arbitration panel's monetary award to be grossly inadequate considering his total acquisition-related expenses, all incurred to comply with Saturn's terms and conditions. As a result of the mandatory binding arbitration clause unilaterally inserted in the franchise contract by the manufacturer, Mr. Shack believes he never received a fair hearing on the merits. Mr. Shack's franchise was terminated, and he consequently suffered tremendous economic loss.

Mr. Shack further testified that:

The administration of Saturn's mandatory binding arbitration process is fundamentally unfair. All of the decision makers in the process have economic ties to Saturn. Under the mandatory binding arbitration that I was subjected to, I had no state remedies, no right to a hearing on the record, no right to an unbiased decision maker, and no real right to an appeal on this issue. 9

[Footnote]

[Footnote 9: See testimony of Mr. William Shack before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, March 1, 2000.]

It is clear that dealers are being required to forfeit important rights and remedies afforded by State law as a condition of obtaining or renewing their motor vehicle franchise contracts. Furthermore, since State laws prohibiting mandatory binding arbitration clauses have been held to be preempted by the FAA, targeted Federal legislation amending the FAA is necessary to remedy this problem.

As discussed below, Congress has acknowledged that a motor vehicle dealer, after making a tremendous investment, depends completely upon the manufacturer to survive and prosper. For example, manufacturers can determine the dealer's stock with the allocation of hot selling models; manufacturers can accelerate or delay warranty payments with great discretion, or alter the rate paid for certain types of work that the dealer performs to honor the manufacturer's warranty; and manufacturers can limit dealers' rights to transfer ownership or control of the dealership—even to family members. According to a recent National Automobile Dealers Association ('NADA') survey, 10

[Footnote] half of the member dealerships are second or third generation family businesses, and many of the family-owned first generation dealerships plan to pass their small businesses on to their children.

[*Footnote 10:* NADA survey conducted May, 2000, of the total 2,148 surveys returned: 1st generation dealerships:

1,029 (48 percent); 2d generation dealerships: 670 (31 percent); 3d generation dealerships: 398 (19 percent); and 4th generation dealerships: 51 (2 percent).]

Noting the imbalances in bargaining power inherent in the manufacturer-dealer relationship, in 1956 Congress enacted the Automobile Dealers Day in Court Act, 15 U.S.C. 1221-1225, to provide small business dealers with recourse in Federal court against manufacturer abuses irrespective of contract terms. This Federal statute serves as precedent for Federal legislation to deal with problems in this area caused by disparities in bargaining power between manufacturers and dealers. However, the Automobile Dealers Day in Court Act has proved to be insufficient to level the playing field between dealers and manufacturers. The act does not provide for equitable relief and fails to address the 'one sidedness' of the motor vehicle franchise contract itself.

In addition, Congress has passed legislation to prevent the forced waiver of substantive rights in disputes between small business service station owners and multinational oil companies. The Petroleum Marketing Practices Act ('PMPA'), 15 U.S.C. 2801-2806, which regulates the franchise relationship between oil refineries and gasoline retailers, was enacted to prevent oil companies from improperly exploiting their unequal bargaining power and to deter unfair conduct by prohibiting refineries from forcing gasoline retailers to accept mandatory binding arbitration and surrendering important statutory rights. Similarly, S. 1140 would ensure that motor vehicle dealers will not be compelled to surrender their statutory rights as a condition of obtaining or renewing their dealer contracts.

In 1925, Congress passed the Federal Arbitration Act (FAA[1]) to address the judicial hostility to arbitration and

make arbitration decisions enforceable in Federal courts. Since 1947, when the FA A was reenacted and codified in title 9 of the United States Code, there have only been minor amendments. However, in two recent alternative dispute resolution ("ADR') statutes discussed below, Congress specifically provided statutory language to ensure that arbitration is voluntary. In the same vein, S. 1140 does not void arbitration as a viable option for dispute resolution, it merely seeks to ensure that participation is voluntary by both parties.

In 1988, Congress first passed the Judicial Improvements and Access to Justice Act, 28 U.S.C. 651-658 (1988), authorizing 20 Federal judicial districts to establish experimental court-annexed arbitration programs as an alternative to formal civil trials. From the outset the law was drafted to ensure the voluntary nature of arbitration. Then, in 1998, Congress passed the Alternative Dispute Resolution Act ('ADR'), 28 U.S.C. 651-658 (1998 amendments), expanding the program to all Federal district courts to provide litigants in all civil cases with at least one alternative dispute resolution process such as mediation, mini trial or arbitration. In that measure, Congress specifically included protective provisions to ensure that arbitration is voluntary. Under the ADR statute a district court may only allow arbitration if the parties consent. The law further clearly creates safeguards to provide true consent by requiring procedures ensuring that 'consent to arbitration is freely and knowingly obtained, and no party or attorney is prejudiced for refusing to participate in arbitration.' Therefore, a party retains the right to pursue a judicial determination of the matter if it so chooses.

Similarly, the focus of S. 1140, to make binding arbitration voluntary rather than mandatory, is fully consistent with the prominent theme that arbitration must be voluntary in court-

annexed proceedings. In addition, S. 1140 will not discourage alternative dispute resolution. In fact, the proposed legislation attempts to protect the State ADR forums established to resolve dealer-manufacturer disputes. Similar to court-annexed arbitration, these forums reduce costs and delays and preserve judicial time and resources.

Additional legislation enacted in 1990 and 1996, the Administrative Dispute Resolution Act, 5 U.S.C. 581-593 (1990 and 1996 amendments), authorizes Federal agencies to use arbitration to resolve administrative disputes if the parties consent. The act goes to great length to emphasize that the decision to arbitrate must be voluntary for both parties. For example, section 585 states that 'an agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining any benefit.' 5 U.S.C. 585 (1990). As stated in the Senate Governmental Affairs Committee Report accompanying the bill:

A new Section 585 authorizes the use of arbitration whenever all parties consent in writing. It prohibits a federal agency from requiring any person to consent to arbitration as a condition of receiving a contractor benefit. This prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides. 11

[Footnote]

[Footnote 11:S. Rept. 101-543, p. 12.]

This provision in the 1990 statute was maintained in the 1996 legislation.

The Motor Vehicle Franchise Contract Arbitration Fairness Act, S. 1140, would simply guarantee that binding arbitration to resolve disputes involving a motor

vehicle franchise contract is entered into only after voluntary agreement by both parties. Voluntary agreements would prohibit motor vehicle manufacturers from mandatorily depriving dealers of rights they are entitled to under Federal and State laws. Thus, S. 1140 conforms with recent congressional efforts to streamline the Federal judicial system, which have recognized the importance of maintaining voluntary consent to binding arbitration.

VI. SECTION-BY-SECTION ANALYSIS

Section 1- Short title

Section 1 provides that the short title of the bill shall be the Motor Vehicle Franchise Contract Arbitration Fairness Act.

Section 2- Election of arbitration

Section 2 amends the Federal Arbitration Act to require that whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, arbitration may be used to settle the controversy only if both parties consent in writing after such controversy arises. This section also requires the arbitrator to provide the parties with a written explanation of the factual and legal basis for the decision.

Section 3- Effective date

Section 3 provides that the amendments to the FAA made by this legislation shall apply only to contracts entered into, modified, renewed or extended after the date of enactment.

VII. COST ESTIMATE

In compliance with paragraph 1 l(a) of rule XXVI, of the Standing Rules of the Senate, the Committee sets forth, with respect to the bill, S. 1140, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. Congress,

Congressional Budget Office,

Washington, DC, November 2, 2001.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has contemplated a cost estimate for S. 1140, the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001. The CBO staff contacts for this estimate are Lanette J. Walker (for federal costs), and Paige Piper/Bach (for the private sector costs).

Sincerely,

Dan L. Crippen,
Director.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

CBO estimates that implementing S. 1140 would cost less than $500,000 annually, assuming the availability of appropriated funds. Enacting the bill would not affect direct spending or receipts, so pay-as-you-go procedures would not apply. S. 1140 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect state, local, or tribal governments. It would impose private-sector mandates as defined by UMRA, but CBO estimates the direct costs if those mandates would fall well below the threshold established by UMRA ($113 million in 2001, adjusted annually for inflation).

S, 1140 would provide that contract disputes between motor vehicle manufacturers and motor vehicle dealers can be resolved by arbitration only after both parties agree to arbitration as a means of settling the dispute. Under current law, manufacturers can include clauses in contracts with dealers that provide for mandatory arbitration if a contract dispute would arise.

CBO estimates that implementing the bill could increase costs to federal courts to the extent that such contract disputes are tried in federal court. Based on information from the Administrative Office of the United States Courts, CBO estimates that any increase in federal costs would be less than $500,000 a year because of the relatively small number of cases expected. Any additional costs would be subject to the availability of appropriated funds.

S. 1140 would impose private-sector mandates on certain motor vehicle manufacturers and arbitrators involved in disputes arising out of or relating to a motor vehicle

franchise contract by allowing arbitration only after both parties in a dispute agree in writing to arbitration, and by requiring an arbitrator elected to resolve such a dispute to provide the parties with a written explanation of the basis for the award. Based on information provided by the National Automobile Dealers Association, the Association of International Automobile Manufacturers, and the American Arbitration Association, CBO estimates that the direct cost of those mandates would fall well below the threshold established by UMRA.

This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VIII. REGULATORY IMPACT STATEMENT

In compliance with paragraph (1 1)(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 1140 will not have a significant regulatory impact.

IX. MINORITY VIEWS OF SENATOR SESSIONS

Senate bill 1140, the Motor Vehicle Franchise Contract Arbitration Fairness Act, takes a piecemeal exemption approach to arbitration reform. The bill takes one type of contract-motor vehicle dealership franchise contracts--and exempts the parties to such contracts from the Federal Arbitration Act (FAA). The bill does not address issues with other types of arbitration and does not attempt to reform the FAA itself. Instead, the bill reverses a long-standing congressional policy favoring arbitration in a manner that undermines the sanctity of contract and has serious implications for other types of transactions to which the FAA currently applies.

Arbitration is an informal process of resolving disputes in which a neutral third party arbitrator renders a decision after hearing both parties. As the Supreme Court has explained, '[b]y agreeing to arbitrate a * * * claim, a party does not forgo * * * substantive rights * * *; it only submits to their resolution in an arbitral, rather than a judicial, forum.' 1

[Footnote] Arbitration in intended to avoid the formalities, expense, and delay of formal dispute resolution before courts.

[Footnote 1: Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628(1985).]

In 1925, Congress passed the Federal Arbitration Act ('FAA') to preempt judicial aversion to arbitration by making arbitration decisions enforceable in Federal courts. Under the FAA, now codified in title 9, United States Code, when two parties agree to a binding contract that affects interstate commerce, an arbitration clause waiving the right to trial in court and calling for the informal settlement of any dispute arising from the contract will be enforceable. 2

[Footnote] If one party to the contract containing an arbitration clause attempts to avoid arbitration and file suit in court, the other party can move to stay or dismiss the action on the grounds that the FAA requires the arbitration clause of the contract to be enforced. 3

[Footnote]

[Footnote 2: 9 U.S.C. 2(1988).]

[Footnote 3: Id. at pars. 3 and 4.]

Since 1925, Congress has amended the FAA in only minor respects. Instead of repealing the FAA, Congress has expanded arbitration, in a nonbinding form, to contexts in which the parties have not agreed to binding arbitration prior to a dispute. For example, Congress has encouraged nonbinding arbitration in the Judicial Improvements and Access to Justice Act, 28 U.S.C. 651-658 (1988), the Administrative Dispute Resolution Act, 5 U.S.C. 581-593 (1990 and 1996 amendments), and the Alternative Dispute Resolution Act (ADR), 28 U.S.C. 651-658 (1998 amendments).

As the expense of court litigation has risen, the use of arbitration has expanded. Clauses requiring parties to submit disputes to arbitration are now found in a variety of contracts, including union contracts, employment contracts, consumer credit contracts, and securities contracts. In cases dealing with arbitration contracts, the Supreme Court has emphasized that the FAA establishes a Federal policy favoring arbitration. 4

[Footnote] In an unbroken line of decisions starting in 1985, the Supreme Court has consistently upheld the application of the FAA to claims arising under the Sherman Act, 5

[Footnote] securities law claims, 6

[Footnote] civil Racketeer Influenced and Corrupt Organizations Act ('RICO') claims, 7

[Footnote] and employment claims. 8

[Footnote] Thus, when parties to various types of contracts agree to arbitrate disputes, the FAA applies and the courts will enforce the arbitration clause.

[Footnote 4: See, e.g., *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, at 24 (1983).]

[Footnote 5: Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-40(1985).]

[Footnote 6: See *Shear son/American Express Inc. v. McMahon,* 482 U.S. 220 (1987) (applying FAA to claims arising under the Securities Exchange Act of 1934); *Rodriguez de Quijas v. Shear son/American Express, Inc.*, 490 U.S. 477 (1989) (applying FAA to claims arising under the Securities Act of 1933).]

[Footnote 7: McMahon, supra note 3, at 239-42 (applying FAA to claims arising under RICO).]

[Footnote 8: See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (applying FAA to claims arising under Age Discrimination in Employment Act); *Circuit City Stores, Inc. v. Adams* 532 U.S. 105 (2001) (applying FAA to State law employment discrimination claim).]

In passing the FAA, Congress stated that '[arbitration agreements are purely matters of contract, and the effect of the [Federal Arbitration Act] is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed on the same footing as other contracts, where it belongs.' 9

[Footnote] The Supreme Court has ruled that arbitration clauses must not be put on a lesser footing than any other clause of a contract. 10

[Footnote] Arbitration clauses are subject, however, to the

same defenses available under State law to the contract itself, such as fraud duress, adhesion, or unconscionability. 11

[Footnote]

[Footnote 9: House Report No. 96, To Validate Certain Agreements For Arbitration, 68th Cong., 1st sess. (Jan. 24, 1924).]

[Footnote 10: Doctor's Associates, Inc. v. *Casarotto,* 517 U.S. 681, 687 (1996) ('Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.[1]).]

[Footnote 11: See id. at 686-87.]

Senate bill 1140 would reverse the intent of Congress as interpreted by the Supreme Court by singling out arbitration clauses in motor vehicle dealer franchise contracts for non-enforcement. S. 1140 would do this even when the U.S. Chamber of Commerce reports that only a small fraction of motor vehicle franchise contracts contain arbitration clauses:

NUMBER OF FRANCHISE AGREEMENTS WITH MANDATORY BINDING ARBITRATION CLAUSE (MBAC) 1

[Source: U.S. Chamber of Commerce (Feb. 27, 2000)]

Manufacturer 2	Approx. No. of Dealers	Dealers with MBA Note
DaimlerChrysler at time of agreement, except in Alabama.	4,435	1,336 Dealer option
Ford	4.958	5
General Motors	7.753	0
Saturn	236	236
Honda and Acura	1.254	4
Suzuki	285	285
BMW	337	0
Ferrari	29	29
Hyundai	483	0
Isuzu	567	0
Kia	441	0
Land Rover	118	0
Mazda	763	0
Mercedes-Benz	316	0
Mitsubishi	495	0
Nissan/Infiniti	1.230	0
Porsche	194	0
Rolls-Royce	36	0
Subaru	603	0
Toyota	1.195	0
Lexus	174	0
Volkswagen	567	0
Audi	258	0
Volvo	332	0
Saab	215	0

By singling out arbitration clauses for non-enforcement, S. 1140 tends to undermine the sanctity of the contract and the stability of contract law. 12

[Footnote] This in turn undermines the certainty of transactions upon which our commerce is depends.

[Footnote 12: E. Allan Farnsworth, The Past of Promise: An Historical Introduction to Contract', 69 Columbia Law Review 576 (1969); Charles Fried, 'Contract as Promise: A Theory of Contractual Obligation', 57 (1981).]

Further, the piecemeal, exemption approach of S. 1140 could have broader implications in areas other than motor vehicle franchise contracts. In a letter to the Judiciary Committee, the Chamber of Commerce of the United States of America stated:

While [S. 1140] purports simply to undo the arbitration clauses in contracts between motor vehicle manufacturers and dealers, its long-term effects would cause serious damage to the use and availability of alternative dispute resolution. * * * S. 1140 would weaken clear congressional intent to encourage alternative dispute resolution. Most importantly, the legislation could also call into question the U.S. Supreme Court's continual reaffirmation of arbitration clauses including its decision earlier this year in *Circuit City Stores, Inc.* v. *Saint Clair Adams* [532 U.S. 105 (2001)]. 13

[Footnote]

[Footnote 13: Letter from R. Bruce Joston, Vice President of Governmental Affairs, U.S. Chamber of Commerce (Sept. 13, 2001).]

Because predispute binding arbitration is often less expensive than litigation in court, 14

[Footnote] arbitration provides the critical benefit of allowing access to dispute resolution to many with small claims who cannot afford the higher price of court litigation. Lewis Maltby, Director, National Task Force on Civil Liberties in the Workplace of the American Civil Liberties Union and a

Director of the American Arbitration Association, has stated:

[Footnote 14: Stephen J. Ware, 'Arbitration Under Assault', Cato Policy Analysis No. 433, p. 3 (Apr. 18, 2002) ('[Arbitration typically reduces costs. Arbitration gains speed and efficiency by streamlining discovery, pleadings, and motion practice. This streamlined process generally results in much lower legal fees and related process costs.').]

Even if the client has clearly been wronged and is virtually certain to prevail in court, the attorney will be forced to turn down the case unless there are substantial damages. A survey of plaintiff employment lawyers found that a prospective plaintiff needed to have a minimum of $60,000 in provable damages-not including pain and suffering or other intangible damages—before an attorney would take the case.

Even this, however, does not exhaust the financial obstacles an employee must overcome to secure representation. In light of their risk of losing such cases, many plaintiffs' attorneys require a prospective client to pay a retainer, typically about $3,000. Others require clients to pay out-of-pocket expenses of the case as they are incurred. Expenses in employment discrimination cases can be substantial. Donohue and Siegelman found that expenses in Title VII cases are at least $10,000 and can reach as high as $25,000. Finally, some plaintiffs' attorneys now require a consultation fee, generally $200-$300, just to discuss their situation with a potential client.

The result of these formidable hurdles is that most people with claims against their employer are unable to obtain counsel, and thus never receive justice. Paul Tobias, founder of the National Employment Lawyer's Association, has testified that ninety-five percent of those who seek help from

the private bar with an employment matter do not obtain counsel. Howard's survey of plaintiffs' lawyers produced the same result, A Detroit firm reported that only one of eighty-seven employees who came to them seeking representation was accepted as a client. 15

[Footnote]

[Footnote 15: Lewis L. Maltby, 'Private Justice: Employment Arbitration and Civil Rights', 30 Col. Hum. R.L. Rev. 29, 57-58 (1998).]

Indeed, Prof. Stephen J. Ware of the Cumberland School of Law has concluded that '[arbitration tends to reduce consumer prices, raise employee wages, and increase access to justice for meritorious claims. Those benefits would not be fully realized if binding arbitration agreements could be entered into only after a dispute arose. 16

[Footnote] Thus, this piecemeal, exemption approach of S. 1140, if applied to other types of transactions, could have negative implications for consumers and employees.

[Footnote 16: Ware, supra note 14, at p. 2.]

At least the automobile manufacturers and dealers that S. 1140 would exempt from the FAA, unlike many consumers and employees, could generally afford to litigate franchise disputes in court. The ability of a relatively wealthy group of businesses to afford to litigate, however, does not compel Congress to completely exempt that group from the FAA. Further, the ability to afford in-court litigation does not justify an exemption from the FAA when such procedural protections, much like those available in court, could be"[1] incorporated into the

FAA itself.

Even with the savings in expense and delay, arbitration can result in unfairness in certain cases depending on the procedural protections for the parties embodied in the contract containing the arbitration clause or those protections that are incorporated by reference, such as the rules of the American Arbitration Association. Accordingly, instead of a piecemeal reform of the FAA via exemptions, a comprehensive review of procedural protections that can be used in arbitration for all parties is more appropriate at this time. For example, a comprehensive reform could include the right to notice and hearing, the right to be represented by an attorney, the right to discovery and the presentation of evidence, the right to a written decision by the arbitrator, the right to a timely resolution of the matter, and the right to a neutral arbitration selected by both parties. 17

[Footnote]

[*Footnote 17:* See, e.g., Consumer and Employee Arbitration Bill of Rights, S. 3210, 106th Cong. (2000).]

Given the broad Federal policy in favor of arbitration, in multiple contexts, the cost and time savings available in arbitration, the limited applicability in practice of arbitration clauses to motor vehicle franchise contracts, and the availability of procedural protections that could be incorporated into the FAA, I cannot support S. 1140 in its current form.

Jeff Sessions.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1140, as reported, are shown as follows (existing lav proposed to be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * * *

TITLE 9-ARBITRATION

Chapter

1. General provisions

* * * * * * *

CHAPTER 1-GENERAL PROVISIONS

Sec.

1. ~ ~ 'Maritime transactions' and 'commerce' defined; exceptions to operation of title

* * * * * * * *

16. Appeals.

17. Motor vehicle franchise contracts.

* * * * * * * *

Sec. 1. 'Maritime transactions' and 'commerce' defined; exceptions to operation of title

'Maritime transactions', as herein * * *

Sec. 16. Appeals

(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

* * * * * * *

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

Sec. 17, Motor vehicle franchise contracts

(a) For purposes of this section, the term --

(!) 'motor vehicle' has the meaning given such term under section 30102(6) of title 49; and
(2) 'motor vehicle franchise contract' means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.

(b) Whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, arbitration may be used to settle such controversy only if after such controversy arises both parties consent in writing to use arbitration to settle such controversy.

(c) Whenever arbitration is elected to settle a dispute under motor vehicle franchise contract, the arbitrator shall provide the parties to the contract with a written explanation of the factual and legal basis for the award.

****